

*Before the*  
**Federal Communications Commission**  
**Washington, D.C. 20554**

In the Matter of  
Broadcast Localism

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MB Docket No. 04-233

**Reply Comments of the Future of Music Coalition**

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## SUMMARY

Future of Music Coalition is pleased that the Commission is taking concrete steps to ensure radio broadcasters adhere to their first and best use – connecting local communities with local content. FMC has a long history of advocating for musicians, particularly with respect to musicians’ relationships to local radio. In these reply comments, FMC submits several highly targeted proposals designed to aid stations’ service to their local communities and musicians. FMC will further participate in this docket to consider whether additional refinement to these proposals or additional proposals should be adopted.

FMC believes strongly in the regulatory priorities of localism, competition and diversity, and believes these goals have been undercut by structural barriers that dramatically limit the ability of local or independent music to appear on local commercial radio stations.

Local and independent record labels are responsible for over 80 percent of the music released in this country. While the evolution of new, Internet-based models to distribute and access music has spurred significant growth in the independent sector’s overall market share (now up to an estimate 30 percent of all sales), many artists and labels complain that access to commercial radio playlists is still limited to artists who sign contracts with major record labels. This is problematic: because of the difficulty in obtaining radio airplay, small, locally based businesses face a significant competitive disadvantage as they invest large amounts of risk capital to build artists’ fan base, only to see these artists sign to major record labels in order to maximize their chances of appearing on commercial radio.

While this dynamic has been widely acknowledged for years, the FCC has declined to gather data necessary to understand these barriers. The New York State Attorney General’s investigation of the impact of rampant payola in the music and radio industries spurred the Commission to action. The resulting settlement with the four largest radio chains was intended in part to address these structural barriers that limit independent music’s access to commercial playlists.

The FCC, however, has demonstrated an ongoing reticence to gather the kinds of data that will inform effective policymaking on this issue. FMC conducted a private quantitative analysis of playlist data, and found that songs released by the four major labels continue to dominate the commercial radio charts. FMC intended to attach this analysis to these reply comments, but the airplay data proprietor – citing the confidential nature of the underlying data – has, to date, refused to let us publish our report.

The data strongly suggest that local radio is still effectively closed to independent or local musicians, calling into question the effectiveness of the consent decrees signed by the four largest radio groups and the Commission in April 2007.

FMC continues to maintain that it is difficult to isolate questions of localism from ownership. FMC believes that local owners are – by definition – more focused on the needs and interests of their communities. FMC urges the FCC to collect and analyze playlist data on a regular and consistent basis so the Commission can fully document the structural inadequacies of consolidated radio ownership as it relates to serving the needs of a community.

While we have our doubts that localism can be effectively regulated, we do believe that increased transparency and accountability are essential to creating incentives for commercial broadcasters to satisfy this important goal. To that end, FMC suggests the Commission take the following specific actions:

- Undertake its own on-going, publicly available analysis of playlist data;
- Collect data from stations about local music airplay;
- Require all radio stations to post, on their web sites and in their public file, the method that they use to create their playlists, which should include the process that determines what songs are placed in the testing pool, if the songs in the testing pool vary from community to community, the location of the audience is being tested, who selects the music, how they make these decisions, and what criteria they use;
- Require all radio stations to make public, by posting on their web sites and in their public file, their commitment to airing local music and an explanation of how musicians can submit their music for consideration; and
- Augment the Commission’s current public education initiative surrounding license renewal with a public education initiative about payola.

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We have documented these abuses and missteps in two significant reports that we filed at the Commission and through assorted comments, testimony before the Commission and *ex parte* briefings.<sup>2</sup> We appreciate the Commission's acknowledgements of the importance of many of the issues we have raised, and we remain eager to work with the Commission to demonstrate how FCC policy decisions and enforcement actions are impacting the music community and listeners as a whole.

For the past five years, FMC has articulated a four-part "Fixing Radio" agenda. This agenda is focused on specific, tangible and common-sense policies that will greatly enhance the role that terrestrial radio can and should play in our society and culture. We believe this agenda will not only assist artists and the music and culture community, but will have tremendous benefits for the listening public as a whole. The four parts of this agenda are:

1. Prevent further radio consolidation
2. Expand and protect community radio

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<sup>2</sup> See 2006 *Quadrennial Regulatory Review – Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, Reply Comments of Future of Music Coalition, MM Docket No. 06-121 (filed Jan. 16, 2007) [hereinafter "*Quadrennial Regulatory Review*"]; Peter DiCola, *False Premises, False Promises: A Quantitative History of Ownership Consolidation in the Radio Industry* (2006), available at <http://www.futureofmusic.org/images/FMCradiostudy06.pdf>; *Quadrennial Regulatory Review*, Comments of Future of Music Coalition and American Fed'n of Musicians, MM Docket No. 06-121 (filed Oct. 26, 2006); *Broadcast Localism*, Reply Comments of American Fed'n of Musicians, American Fed'n of Television and Radio Artists, Future of Music Coalition, The Recording Academy, Recording Artists' Coalition, MB Docket No. 04-233 (rel. Jan. 3, 2005); *Broadcast Localism*, Comments of the Future of Music Coalition, MB Docket No. 04-233 (rel. Nov. 1, 2004); *Digital Audio Broadcasting Systems and Their Digital Impact on the Terrestrial Radio Broadcast Service*, Comments of American Fed'n of Musicians, American Federation of Television and Radio Artists, Future of Music Coalition, MM Docket No. 99-325 (June 16, 2004); *Digital Audio Broadcasting Systems and Their Digital Impact on the Terrestrial Radio Broadcast Service*, Reply Comments of American Federation of Musicians, American Federation of Television and Radio Artists, Future of Music Coalition, The Recording Academy, Recording Artists' Coalition, MM Docket No. 99-325 (filed Aug 2, 2004); Peter DiCola and Kristin Thomson, *Radio Deregulation: Has It Served Citizens and Musicians?*, (2002) available at <http://www.futureofmusic.org/images/FMCradiostudy.pdf>.

3. End structural payola
4. Ensure the transition to HD radio benefits musicians and the public

It is important to acknowledge at the outset of these comments that FMC believes the questions of station ownership and localism are inextricably linked. We believe the record clearly demonstrates that the massive and radical restructuring of the commercial radio industry following the 1996 Telecommunications Act had two fundamental effects. First, these policy changes allowed a disproportionate amount of market share to shift quickly into the hands of a small number of powerful broadcasting companies that base their business models on streamlining costs by reducing the amount of live, local programming and eliminating layers of management. Second, the domination of these larger owners skewed the historically diverse advertising revenue pie, putting significant economic pressure on small, local owners. Tragically, many of these small owners – the types of broadcasters who lend diversity and local flavor to the airwaves – were either bought up by larger broadcasters or shut down their operations, which further reduced the niche and local programming that traditionally provided much of what made radio a vibrant communications medium in the first place.

For an organization that professes to focus on the “future” of music, it may seem quaint that we remain so committed to radio’s adherence to the traditional goals of “localism, competition and diversity.” But we see enormous value in these goals. Our nation is moving toward a global communications environment, where members of the public who have the time, interest and economic means can access content – including music – through a dizzying array of legal platforms, including Internet-delivered radio stations, satellite radio, social networking sites, music blogs, digital download stores,

subscription services and others. In this context, the ultimate and most unique value of terrestrial radio centers on its ability to provide free, local content. Consumers don't need another alternative to these global outlets; they need and desire media that reflect the unique happenings of their local community and that can relate the local community to the global culture.<sup>3</sup>

FMC has a long history of advocating for musicians, particularly with respect to musicians' relationships to local radio. FMC submits in these comments several highly targeted proposals designed to aid the stations' service to their local communities and the music communities. FMC believes that this proceeding is an important one that will be a valuable opportunity for the many stakeholders involved to offer proposals and counterproposals. For example, FMC recognizes that small, noncommercial and LPFM radio stations have very different capacities than the largest radio station groups, and thus those stations may have important characteristics that the Commission should consider as it reviews the various proposals in this proceeding. However, FMC strongly supports collecting some data from *all* broadcasters in order to gain an accurate picture of the broadcasting environment, even if the burdens for smaller broadcasters are reduced. FMC will be further analyzing the docket in this proceeding and working to refine its suggestions and develop additional proposals.

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<sup>3</sup> *Broadcast Localism*, Comments of Clear Channel Communications, Inc., i, MB 04-233 (rel. Apr. 28, 2008) [hereinafter "*Clear Channel Comments*"].

## **II. THE COMMISSION MUST COLLECT AND ANALYZE ADDITIONAL DATA ABOUT PLAYLISTS AND LOCAL MUSIC AIRPLAY.**

### **A. Radio Remains Closed to Local Independent Musicians.**

Unlike the arbitrary and anecdotal examples of local artists receiving airplay that Clear Channel noted in its moving comments,<sup>4</sup> FMC's own private analysis of playlist data strongly suggests that radio stations fail to broadcast independent content. FMC conducted a private quantitative analysis of playlist data. We intended to provide our analysis to the Commission, but the airplay data proprietor – citing the confidential nature of the underlying data – has, to date, refused to let us publish our report, even though it reflects our work and does not disclose the underlying data. Nonetheless, our analysis supports what we had long suspected; just a handful of songs dominate the airwaves, and nearly all the songs receiving airplay are released by one of the four major labels. Moreover, the refusal to permit us to release our analysis demonstrates why it is so important that the FCC collect playlist data.

To provide context, American-owned independent record labels release over 80 percent of the music in the domestic marketplace and are collectively responsible for roughly 30 percent of the retail market share.<sup>5</sup> Independently-released music can be found all over our culture – these are bands that play huge venues, are featured in films or advertising campaigns, on network television programs, on non-commercial terrestrial

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<sup>4</sup> *Id.* at 86.

<sup>5</sup> American Association of Independent Music (A2IM), *Mission / Objectives: Branding*, <http://www.a2im.org/mission.aspx> (last visited June 3, 2008).

radio, and even the Billboard Top 10 sales charts.<sup>6</sup> Yet this music, which is so important to our culture and local economies, remains virtually absent from commercial radio.

For example, the band Arcade Fire released its second album – *Neon Bible* – in 2007 on the Chapel Hill, NC-based independent label, Merge Records. The album debuted at #2 on the Billboard charts, selling over 92,000 albums in its first week.<sup>7</sup> The band played on *Saturday Night Live*,<sup>8</sup> had its shows broadcast on National Public Radio,<sup>9</sup> was interviewed by Terry Gross for NPR’s Fresh Air, and the album got a glowing review in *Rolling Stone*. The band embarked on a worldwide tour that took them through the United States – including shows at legendary venues like the 7,000-capacity Red Rocks Amphitheatre in Denver,<sup>10</sup> and the 13,000-capacity Hollywood Bowl in Los Angeles<sup>11</sup> – Canada, Europe, Japan and Australia. *Neon Bible* was nominated for a Grammy in the Best Alternative Rock Album category, and won Canada’s Juno Award for Best Alternative Album of the Year.<sup>12</sup>

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<sup>6</sup> See e.g., *Yo La Tengo Sell Out: Part I*, <http://www.yolatengo.com/sellout1.html> (last visited June 3, 2008) (stating that the band had protected its integrity by writing new songs to license to companies for commercials rather than selling out and licensing their previously written songs); *Alexandra Patsavas*, Wikipedia, [http://en.wikipedia.org/wiki/Alexandra\\_Patsavas](http://en.wikipedia.org/wiki/Alexandra_Patsavas) (last visited June 3, 2008); *Music from the O.C.: Liner Notes*, <http://www.musicfromthecoc.com/linernotes/> (last visited June 3, 2008) (listing Alexandra Patsavas as the music supervisor for the O.C., which used a number of independent artists both on the show and on the soundtracks); Katie Hasty, ‘Juno’ Unseats Keys from Atop Album Chart, BILLBOARD, Jan. 30, 2008; *Rhino*, <http://www.rhino.com/about/index.lasso> (last visited June 3, 2008) (showcasing how Rhino came about and the philosophy of the company); *About KEXP*, <http://kexp.org/about/about.asp> (last visited June 3, 2008) (discussing the history of KEXP radio, its mission, and its continual expansion in the community); *About WFMU Radio*, <http://wfmuradio.org/about.shtml>, (last visited June 3, 2008) (describing how WFMU is an independent non-commercial radio).

<sup>7</sup> “Notorious B.I.G. ‘Great’ Again on the Billboard Top 200”, Billboard, March 14, 2007 [http://www.billboard.com/bbcom/news/article\\_display.jsp?vnu\\_content\\_id=1003557829](http://www.billboard.com/bbcom/news/article_display.jsp?vnu_content_id=1003557829)

<sup>8</sup> “Arcade Fire to Play Saturday Night Live”, Pitchfork, February 15, 2007 <http://www.pitchforkmedia.com/article/news/41185-exclusive-arcade-fire-to-play-saturday-night-live>

<sup>9</sup> “Arcade Fire to Rock NPR”, Pitchfork, February 7, 2007 <http://www.pitchforkmedia.com/page/news/41020-exclusive-arcade-fire-to-rock-npr>

<sup>10</sup> “Last Night: Arcade Fire at Red Rocks”, Westword, September 17, 2007

[http://blogs.westword.com/backbeat/2007/09/last\\_night\\_arcade\\_fire\\_red\\_rock.php](http://blogs.westword.com/backbeat/2007/09/last_night_arcade_fire_red_rock.php)

<sup>11</sup> “Arcade Fire and LCD Soundsystem Storm Hollywood Bowl”, NME.com, September 21, 2007 <http://www.nme.com/news/arcade-fire/31303>

<sup>12</sup> 2008 Juno Award Winners” [http://www.juno-awards.ca/08\\_nominees.php](http://www.juno-awards.ca/08_nominees.php)

Despite the success of their tours, their retail sales, and the national and international recognition for their work, Arcade Fire's music was barely played on commercial radio in 2007. Clearly neither quality nor popularity is an issue, given the accolades and sales that the band's music has garnered, but Arcade Fire remains committed to its small, indie label, Merge Records, which first took a risk with them. Yet, likely for this reason, they receive virtually no airplay.<sup>13</sup>

In addition to conversations with independent label owners, managers and artists, FMC's own analysis strongly suggests that local independent musicians are still foreclosed from commercial radio, despite the consent decrees and voluntary agreements signed by CBS Radio, Citadel, Clear Channel and Entercom in April 2007.<sup>14</sup> The FCC must investigate and determine whether the broadcast groups have complied with their obligations. If they have, the obligations are not sufficient to ensure that local and independent artists have access to the airways and must be revised.<sup>15</sup>

**B. The Commission Should Routinely Analyze Playlist Data and Publicize the Results.**

As a first, essential step, the Commission must begin collecting and analyzing playlist data itself on a regular basis. Without regular reports and data, the FCC will not know whether our laws prohibiting payola are working. Under Section 317 of the Communications Act, radio (and TV) stations are prohibited from accepting

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<sup>13</sup> Examples of other bands that have recently released records and had strong sales, nationwide visibility and/or touring success – but correspondingly little commercial airplay – include The Hold Steady, My Morning Jacket and Radiohead, as well as recent releases by The Eagles and Bruce Springsteen. See, for example, “Bruce: Refused Magic Airplay”, Fox News, October 30, 2007 <http://www.foxnews.com/story/0,2933,306164,00.html>

<sup>14</sup> Many of the items Clear Channel notes as “Promoting New and Local Artists” do not even involve radio airplay, *Clear Channel Comments* at 85-88.

<sup>15</sup> Our analysis contradicts Clear Channel's unsupported assertion that the FCC's proposals suffer from flaws under the Administrative Procedure Act because there is no “problem” to be addressed. *Id.* at 19.

consideration for playing content without disclosing it to the audience. The Commission is charged with enforcing this provision, but it has never regularly collected data that would allow it to judge the variations in the content aired on radio stations, over time.

This question goes to the heart of the Commission's understanding of the industry it regulates, and yet it has been only on the initiative of FMC and its partners that the Commission is aware of the need to access the data that will allow it to measure the effectiveness of its policies. The Commission has a basic responsibility to understand if there are structural barriers that arbitrarily disadvantage artists who choose to release music on local and independent record labels, and to develop a mechanism to obtain ongoing access to playlist data as a quantitative measure of the industry's performance. For too long, the Commission's reluctance to use the tools to perform basic oversight has played a significant contributing role to the abuses we have seen in the commercial radio industry. As noted above, monitoring playlists will also help the Commission to judge whether the four radio stations that entered into consent decrees with the Commission are complying with those agreements.

The Commission has available several options to analyze this data. One option is to require broadcasters to submit playlists to the Commission as FMC has previously recommended. It is not, however, in FMC's interest to create bureaucratic hurdles for broadcasters or to request data for the sake of data – we simply want commercial broadcasters to play by the rules, serve their local community, and lift the structural barriers that limit the ability of local and independent artists to gain commercial airplay.<sup>16</sup> An alternative might be for the Commission to access the data via readily available

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<sup>16</sup> Radio stations that simulcast have already set up a system to collect and report playlist data pursuant to their obligations under 17 U.S.C. Section 114(d)(2).

airplay monitoring services like BDS, Mediaguide or Mediabase, if the questions about the proprietary nature of the data could be resolved sufficiently so that the Commission's analysis can be made public.

**C. The Commission Should Collect Data about Local Music Airplay.**

Beyond playlist data, an important element of a station's commitment to local culture is currently not available. As the Commission has articulated again and again, its media ownership rules are based on the Commission's goals of localism, competition and diversity, but the Commission has not regularly collected data monitoring any measure of localism in broadcasting.<sup>17</sup>

In radio there is no consistent nationwide data available to evaluate how much local music is played on the nation's airwaves each year. In the Commission's *Enhanced Disclosure Order*, the Commission required all television stations to provide additional information to the public and the Commission about their responsiveness to community needs and describe other important categories of programming.<sup>18</sup> FMC believes that radio stations should comply with similar disclosure obligations tailored for the radio medium. Specifically, radio stations should report on the number of minutes per week that they air music from the local community or by acts performing in the community.

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<sup>17</sup> See, e.g., *Quadrennial Regulatory Review*, Report and Order and Order on Reconsideration, MB Docket No. 06-121, FCC 07-216 (Dec. 18, 2007) at ¶ 9.

<sup>18</sup> *Standardized and Enhanced Disclosure Requirements for Television Broadcast Licensee Public Interest Obligations*, ¶¶ 32-51, MM Docket No. 00-168, FCC 07-205 (rel. Jan. 24, 2008) [hereinafter "*Disclosure Requirements*"]. The Commission indicates in this proceeding that it is considering these issues in the Digital Audio Broadcasting docket. *Id.* at para. 22. However, that docket is limited to considering changes as part of the digital radio transition, and these comments are directed toward all current radio broadcasters.

FMC also understands Clear Channel’s position that such definition needs to be clear and not vague.<sup>19</sup> Establishing a clear definition is not particularly difficult. For example, FMC proposes that “local music” could be satisfied by recordings meeting either of these definitions (i.e., 1 OR 2, not 1 and 2):

1) Music written by a songwriter or recorded by an artist or who resides within the community of license, or in the alternative, resides within 100 miles of the transmitter. To determine the residence of bands, a majority of the members would need to reside within the geographic limit. The music must be self-released by the artist, or released by an independent label.<sup>20</sup>

– or –

2) Recordings on an independent label that has its main offices within the community the broadcaster is licensed to serve or within 100 miles of the transmitter.

In both cases, it would be easy for radio stations to publicly request submissions from local artists and local record labels that fit the geographic criteria. The goal here is not to require broadcasters to hunt for local music; rather, the goal is to encourage broadcasters to become more open to playing music from local artists and labels.

Collecting this data would be consistent with the Commission’s practice in many other areas. For example, the Commission evaluates diversity in video programming on a regular basis.<sup>21</sup> As part of its media ownership proceedings, the FCC commissioned

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<sup>19</sup> *Clear Channel Comments* at 12 (discussing the definition of the term “diversity”).

<sup>20</sup> For the purposes of this measurement, an independent label is any label that is not more than 50 percent owned by one of the four major labels – Sony BMG, Universal, EMI or Warner Bros. – or any of their subsidiary companies.

<sup>21</sup> *See, e.g., Annual Assessment of the Status of Competition in the Market for the Diversity of Video Programming*, Twelfth Annual Report, MB Docket 05-255, FCC 06-11 (rel. March 3, 2006).

and conducted several studies attempting to evaluate connections between localism and media ownership.<sup>22</sup> These reports demonstrate that collection of data and publication of reports are fully within the Commission's authority. Even more important, the data is essential for the Commission to understand the industry it regulates. Further, by collecting and publishing this data, members of the public will be able to better understand and hold accountable radio stations around the country.

### **III. THE COMMISSION SHOULD ADOPT DISCLOSURE OBLIGATIONS THAT WILL HELP COMMUNITIES TO ENSURE STATIONS ARE PROMOTING LOCALISM.**

When it comes to music programming, FMC believes that building a strong tie to the local community is simply smart business and fundamental to what gives a terrestrial broadcaster a marketplace advantage. But FMC recognizes that many broadcasters believe that placing this focus on the local community does not make good business sense. We believe these stations will continue to lose listeners and revenues as the public pursues more compelling content options.<sup>23</sup> We also believe that all stations, regardless of their enthusiasm (or lack thereof) for serving their local community, have an obligation to clearly state their policies.

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<sup>22</sup> See, e.g., GREGORY S. CRAWFORD, MEDIA OWNERSHIP STUDY #3: TELEVISION STATION OWNERSHIP STRUCTURE AND THE QUANTITY AND QUALITY OF TV PROGRAMMING (2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/openAttachment.do?link=DA-07-3470A4.pdf](http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A4.pdf); AUSTAN GOOLSBEE, STUDY 9: VERTICAL INTEGRATION AND THE MARKET FOR BROADCAST AND CABLE TELEVISION PROGRAMMING (2007), available at [http://fjallfoss.fcc.gov/edocs\\_public/openAttachment.do?link=DA-07-3470A10.pdf](http://fjallfoss.fcc.gov/edocs_public/openAttachment.do?link=DA-07-3470A10.pdf).

<sup>23</sup> *Digital Listening Growing, Radio Slipping*, CNET NEWS, May 13, 2005, [http://news.cnet.com/digital-listening-growing,-radio-slipping/2100-1027\\_3-5706376.html](http://news.cnet.com/digital-listening-growing,-radio-slipping/2100-1027_3-5706376.html) (last visited June 3, 2008) (noting an increase of 22% of people who listen to music on their computer, an increase of 37% of people who listen to free streaming music, and a decrease of 4% of people who listen to traditional radio); Shelly Freierman, *The Youngsters Aren't Listening as Much*, NEW YORK TIMES, Oct. 6, 2006 (finding that traditional radio listening has dropped significantly in the 18 to 24 demographic, by 21%, and the 12 to 17 year-old demographic, by 19%, and citing downloadable songs as one of the reasons for the decrease in radio listening). *Radio's Popularity Declining Unevenly*, NEW YORK TIMES, June 10, 2008, <http://www.nytimes.com/2008/06/09/business/09drill.html> (last visited June 10, 2008).

Under Title III of the Communications Act, radio broadcasters have a legally binding obligation to compensate the public for their free use of the airwaves. And yet, radio stations currently have little holding them accountable for how they develop their playlists or whether they keep their commitments to air local music or culture. The challenge for the Commission to address is how local concerns and culture can and should be at the core of a local station's mission. Thus, FMC attempts to define a flexible standard that can be shaped by each local broadcaster but also will be concrete enough to enable the local community to hold that broadcaster accountable to the activities the each broadcaster determines will promote localism in accordance with its legal obligations.

FMC bases its approach on a few concepts:

1. As part of the privilege of holding a broadcast license, a broadcaster must affirm how its station proposes to serve the local community;
2. All stations should make readily available their "social contract" with the local public, including the process they use to consider songs for airplay and their commitment to the local cultural community; and
3. The stations should report annually on their performance against these plans and place them in their public files so that the community will be in a position to monitor compliance with these commitments.

As one way to implement these principles, FMC proposes that all radio stations create their own transparent plans for playlist development and their own "social contracts" for airing local music.

**A. The Commission Should Require Transparency in Playlist Development.**

The overarching lack of transparency and accountability in playlist creation is troubling. Neither the public, musicians, nor Commission staff have any way to know how station owners select the songs that they play, or even how they determine what songs are placed in the testing pool or what community/audience is tested. While there are certainly more musicians (and individuals) who wish to be heard on the air than there is available air time, local radio stations and their listeners need a more sophisticated discussion to address concerns by local musicians who are being shut out.

So as not to burden broadcasters, FMC would strongly prefer to keep this obligation as flexible as possible, to allow for a broad array of tools and techniques by radio stations. As such, FMC recommends that each radio station create a Playlist Transparency Disclosure document that describes how it selects songs for airplay. The plan would need to address the following: 1) how songs are selected for testing in focus groups; 2) if songs placed in the testing pool vary from location to location; 3) how often focus groups are run; 4) the geographic location and other characteristics of the audiences tested; 5) which staff are responsible for selecting songs; 6) what staff time is dedicated to listening to new submissions of music; and 7) any commitments as part of playlist development to included new, local, or independently produced music. Notably, FMC does not suggest that the FCC mandate market research regarding playlists, only that a station disclose how it selects songs for airplay, and if a station chooses to conduct market research, that the research basis be disclosed and transparent.

This Playlist Transparency document would be placed in the public file, and thus on the web site, of every radio station.

**B. The Commission Should Require a Local Music and Culture Plan.**

FMC believes each radio station should also create a local music and culture plan that would also be placed in the station's public file and on their web sites. Playlists and playing local music is only part of the picture that radio broadcasters play in fulfilling their obligation to serve localism principles. A local music and culture plan will also highlight the initiatives that radio broadcasters take to promote local music and culture in other ways.

This is important part of localism not only because it promotes local culture, but also because music is an important part of most local communities and their economies, and as part of each station's commitment to its community of license, it has an obligation to appropriately serve and cover this portion of the community's economic base. For example, the:

'core' of Seattle's music industry ... generates nearly 8,700 direct jobs in over 2,600 businesses. The jobs ... contribute \$197.3 million in labor income. An additional 2,000 individuals are employed in 335 music-related businesses, with labor income of almost \$70 million. In combination, both the core and supporting industries support nearly 10,700 jobs in nearly 3,000 businesses contributing \$266 million in labor income... Total sales by the core components of the Seattle music industry businesses approach \$650 annually. Adding in the supporting industries, total sales rise to nearly \$1.3 billion.<sup>24</sup>

The report notes that, in addition to the direct economic impact, "the music industry has significant indirect effects on the local economy through multiplier relationships."

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<sup>24</sup> W. BEYER, A. BONDS, A. WENZL & P. SOMMERS, THE ECONOMIC IMPACT OF SEATTLE'S MUSIC INDUSTRY: A REPORT FOR THE CITY OF SEATTLE'S OFFICE OF ECONOMIC DEVELOPMENT ii (Feb. 2004), available at [http://www.seattle.gov/Music/docs/Seattle\\_Music\\_StudyFinal.pdf](http://www.seattle.gov/Music/docs/Seattle_Music_StudyFinal.pdf).

Seattle is not alone or unique. Similar studies in other cities show that local music creates jobs in the community and contributes to a vibrant local economy.<sup>25</sup>

As such, the plan should include the initiatives that the broadcaster intends to take that will promote localism through local music and culture. For example, a plan could include: 1) featuring local artists through airplay and studio interviews/guest appearances, 2) raising awareness of upcoming music events in the community that do not have economic ties to the broadcaster or their parent company, and/or 3) including local artists in shows sponsored by the broadcaster.

FMC does not believe it is sufficient to set aside a certain block of time in an unattractive day part (what has been termed the “Sunday night alternative ghetto”) to meet these commitments. Rather, a successful Local Music Plan will prioritize the ongoing opportunity to boost both local artists and the broader local music community. Radio broadcasters will have the opportunity to demonstrate their compliance with these plans by putting annual reports in their public files.

#### **IV. FCC POLICIES TO PROMOTE LOCALISM ARE FULLY CONSTITUTIONAL.**

Clear Channel argues that the FCC’s proposals to promote localism are unconstitutional.<sup>26</sup> Clear Channel’s arguments are almost completely predicated on an invalid proposition of law – the supposed “unsustainability” of *Red Lion v. FCC*, 395

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<sup>25</sup> See, e.g., *Study Shows Jacobs School of Music Economic Activity Totals \$120 Million*, INSIDE INDIANA BUSINESS, April 22, 2008, available at <http://www.insideindianabusiness.com/newsitem.asp?id=28967>; *Texas Perspectives: The Role of Music in the Austin Economy*, Sept. 25, 2001, available at <http://www.ci.austin.tx.us/telecom/musicstudy.htm>; Iris Hiskey Arno, *Study Makes It Official: Arts Help Local Economy*, N.Y. TIMES, July 1, 2007; John Gnuschke, *Memphis Music Sings Sweet Tunes to Local Economy*, BUSINESS PERSPECTIVES, Nov. 1, 1998, <http://www.allbusiness.com/specialty-businesses/731527-1.html> (last visited June 3, 2008).

<sup>26</sup> *Clear Channel Comments* at 2-20, 91-96.

U.S. 367, 390 (1969). While broadcasters have long hoped that the Supreme Court would find that broadcasters benefit from a higher standard of First Amendment analysis than that articulated in *Red Lion*, the Supreme Court has thus far refused to do so. As articulated repeatedly by the Appellate courts, the Supreme Court has utilized *Red Lion* each time a broadcasting case has come before it, and neither the Commission nor the lower courts are free to reject it.<sup>27</sup>

Although Clear Channel cites the Commission's conclusions that, as a factual matter, the Fairness Doctrine was no longer required to promote the public interest,<sup>28</sup> that very doctrine was upheld as constitutional in *Red Lion v. FCC*, a doctrine that was at least as targeted toward promoting public interest content as any of the proposals in this docket. Clear Channel's concern that the pending case *Fox Television Stations, Inc. v. FCC*, 489 F.3d 444 (2d Cir. 2007), *cert. granted*, may change the relevant constitutional standard for broadcasting is premature. Not only is it unlikely that the Supreme Court will overrule *Pacifica*, but it is a fools errand to act under anything but existing precedent until all parties see how the Court will rule.<sup>29</sup>

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<sup>27</sup> See, e.g., *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046 (D.C. Cir. 2002) ("First, contrary to the implication of the networks' argument, this court is not in a position to reject the scarcity rationale even if we agree that it no longer makes sense. The Supreme Court has already heard the empirical case against that rationale and still 'declined to question its continuing validity.'" (citing *Turner v. FCC*, 512 U.S. 622, 638 (1994)).

<sup>28</sup> *Clear Channel Comments* at 8.

<sup>29</sup> Not only are FMC's proposals to promote localism fully within the Commission's authority and constitutional, but the stronger proposal to adopt processing guidelines are also supported by current law and constitutional analysis. FMC endorses the legal and constitutional analysis included in the Reply Comments of the Public Interest, Public Airwaves Coalition in this docket. *Reply Comments of Public Interest Public Airwaves Coalition* (filed June 11, 2008).

**V. THE COMMISSION SHOULD ADOPT ADDITIONAL MECHANISMS TO GIVE THE PUBLIC MORE INFORMATION ABOUT LICENSEES.**

The Commission seeks comment on whether additional steps should be taken to increase communication between the community and a licensee, and how to increase the amount of community responsive programming.<sup>30</sup> As stated above, FMC believes the fundamental issues of concern include the structural barriers that keep independent and local music off the commercial airwaves, a lack of transparency and accountability from local broadcasters in communicating their commitment to the local community and a broader sense of how to define “service” to a local community.

Many, if not most, broadcasters have shirked any sense of accountability to their community of license for years, and it is the Commission’s responsibility to put into practice policies that are clearly understood and are enforceable. In 2004, FMC participated in a process with broadcasters, consumer advocates, public officials and members of the music community to draw up some broad principles of how to reinvigorate broadcasters’ connections to the community. The fruit of that work, the Seattle “Fixing Radio” statement, is attached as Appendix A to our comments. Several of those elements are responsive to the Commission’s questions here.

FMC believes stations should be required to hold annual public forums in which local station managers report on PSA broadcasting and community service activity and demonstrate to the public that the station has met its public interest obligations. These forums should be advertised on the air and should be held in a location convenient to where most listeners live and work.

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<sup>30</sup> Notice at paras. 16-29, 40-44.

The Commission's requirement that stations place public files on the Internet will go a long way to fulfilling the Fixing Radio Statement's concern that public files be easily accessible. In addition, we believe that radio stations' public files should be expanded in a manner similar to the new television enhanced disclosure forms. For example, they should include complete records of all on-air promotions, contest rules and copy, as well as Arbitron or other ratings information.

In many cases, broadcasters would benefit greatly from reestablishment of community advisory boards to provide formal guidance and ongoing communication with the local community. However, an aggressive strategy of featuring local artists and serving the programming needs of the local music community might mitigate the need for a formal advisory board structure.

## **VI. THE COMMISSION SHOULD FURTHER EDUATE THE PUBLIC AND MUSICIANS ABOUT PAYOLA TO ENHANCE ENFORCEMENT.**

In this *Notice*, the Commission is relying upon its existing enforcement efforts for its payola rules.<sup>31</sup> In its *Enhanced Disclosure Order*, the Commission noted that its license renewal procedures are complicated and difficult for members of the public to use and committed to improving its web site and accessibility for members of the public.<sup>32</sup> The FCC needs a similar, more aggressive, public education effort about payola so that aggrieved musicians and listeners can raise questions about payola violations when they occur.

As Appendix B to these comments, FMC submits a guide that we produced to help artists, record labels, music fans and the general public understand what payola is,

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<sup>31</sup> *Id.* at paras. 107-110.

<sup>32</sup> *See, e.g., Disclosure Requirements* at ¶¶18-19.

why it is important and what individuals can do if they feel that local broadcasters have broken the spirit or letter of the law or regulations.

In particular, the Payola Education Guide outlines the details of the 2007 Voluntary Agreement and the Indie Set-Aside, executed by Clear Channel, CBS Radio, Entercom and Citadel in April 2007. FMC's Payola Education Guide notes three core weaknesses in the voluntary agreement:

1. First, the station owners may claim that the voluntary agreement is separate from the consent decrees made with the FCC. FMC suspects that they were prepared as two documents so that if they violate the voluntary agreement, it is not a violation of the more formal consent decrees. And since the Rules of Engagement might be considered strictly voluntary, any violation of restrictions set forth in the agreement that go beyond what the law requires will incur no penalty. As Senator Feingold put it in an open letter to radio companies, "The weakness of the voluntary reforms is that there is no impartial arbiter like the FCC to determine the meaning of the rules, so they can be parsed or ignored with only public opinion as a partial check."<sup>33</sup> A much better solution would have been for the FCC to create a designated payola investigator in the Enforcement Bureau whose regular scrutiny would permanently suppress payola.

2. The Rules of Engagement also contain no system to oversee the stations' compliance with the agreement. The closest it comes is a note that the FCC can request information tracked by stations on consideration paid/made by artists and

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<sup>33</sup> Senator Russell D. Feingold. July 11, 2007. Letter to radio companies. <http://feingold.senate.gov/~feingold/releases/07/07/20070711.html>

labels. And stations only need to track consideration that is “above a reasonable threshold.” There is no guidance given about where that threshold is set. If stations have not been following payola laws in the past, a voluntary agreement to provide information to the FCC, if and when requested, is not much oversight. To succeed, these new operating procedures call for constant vigilance on the part of all cooperating parties.

3. Even if stations do collect useful information and it is given to the FCC, the agreement does not state whether the FCC can (or must) release this information to the public. The FCC has a very bad track record at overseeing stations for payola violations; the last payola violation the FCC pursued before the New York Attorney General’s recent investigation was in 1984. Without public oversight, stations are given free reign to obfuscate while continuing to engage in illegal practices.

While the intentions behind the indie set-aside are clear – to encourage radio station group owners to play more independent content – the vague language in the agreement makes it very easy for radio stations to claim that their current programming methods are in compliance. Of course, there would be no need for this agreement if independent music was already in rotation. The negotiating parties may need further clarification to ensure the station groups live up to the accord rather than reinterpret it for the purpose of avoidance.

The FCC collects complaints from the public about potential violations of the payola rules, but does not issue data based on those complaints.<sup>34</sup> The FCC should post an annual summary of how many complaints were made against each station and what each complaint alleged (although the actual complaints should be confidential). FMC remains willing to work with broadcasters and broadcast station groups to build a set of best practices for broadcasters to use. In addition, the FCC must educate music communities about payola – possible strategies include creating a hotline to complain, providing simple and easy way to find background about payola and a streamlined complaint form on the FCC website, asking broadcasters to educate public about payola, perhaps even requiring music stations to broadcast PSAs about payola.

## **VII. CONCLUSION**

FMC thanks the Commission for issuing this Notice of Proposed Rulemaking on Broadcast Localism. Our suggestions will not only improve stations' service to local music and culture today, but also are designed to enable the Commission and the public to evaluate broadcaster's conduct and service to these important communities in the future, and, as a result, to create better policies. We urge the Commission to take the following actions:

- Undertake its own on-going, publicly available analysis of playlist data;
- Collect data from stations about local music airplay;
- Require all radio stations to post, on their web sites and in their public file, the method that they use to create their playlists, which should include the process that determines what songs are placed in each testing pool, if the songs in the testing pool vary from community to community, the location of the audience is

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<sup>34</sup> See “The FCC’s Payola Rules” for the FCC payola complaint instructions <http://www.fcc.gov/cgb/consumerfacts/PayolaRules.html>

being tested, who selects the music, how they make these decisions, and what criteria they use;

- Require all radio stations to make public, by posting on their web sites and in their public files, their commitment to airing local music and to explain how musicians can submit their music for consideration; and
- Augment the Commission's current public education initiative surrounding license renewal with a public education initiative about payola.

We look forward to participating in any steps to ensure that terrestrial radio serves local communities and is regulated and monitored in a way that supports musicians and the local community.

Respectfully submitted,

\_\_\_\_\_/s/\_\_\_\_\_  
\_\_\_\_\_

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## **Appendix A: Seattle Fixing Radio Statement**

## **Seattle Statement on Radio Fixing Radio Forum, Seattle 2004**

### **Introduction**

In February 2004, a diverse group of commercial and noncommercial radio professionals, musicians, union leaders, artist representatives, consumer advocates and public officials met in Seattle to discuss the current state of radio broadcasting in the United States. Our Fixing Radio Forum took place at a time when many Americans were, for the first time, paying attention to the Federal Communications Commission, and to the laws and policies by which our broadcast media are held accountable to the public good.

As the year began, Congress and the federal courts were still occupied with questions about the FCC's June 2003 decision to dramatically loosen media ownership rules. While lauded by the few broadcasting companies who would benefit from deregulation the decision was otherwise almost universally denounced as antidemocratic. A completely unprecedented public outcry emerged despite meager press coverage, with hundreds of thousands demanding that Congress overrule the controversial decision. Despite several stalled attempts to reinstate ownership limits through legislation, however, Congress accomplished relatively little.

Then, at the beginning of February, Janet Jackson's infamous breast-baring "wardrobe malfunction" during CBS' Superbowl broadcast unleashed a firestorm of criticism which raged across the media. This time Congress seemed eager to back up the FCC's immediate calls for stricter penalties for indecency and expanded enforcement. The controversy brought into focus long-standing critiques of the vulgar stunts and offensive patter which have become endemic to shock-jock commercial FM. At the same time, free speech advocates became alarmed by the sudden threat of new, broadened content restrictions or selective rule enforcement.

All in all, the recent national debates over media ownership and indecency have created a rare public conversation about the FCC's traditional regulatory values of diversity, competition and localism, and the topic of media policy has connected itself to numerous more present and ubiquitous concerns, especially US foreign policy and the war in Iraq.

The values summarized by the term "localism," including a commitment to locally originated programming and accountability to local communities, are particularly significant for radio operators. In the age of satellite broadcasts, digital cable and the Internet, radio remains the most local and ephemeral of our media, with a special ability to engage both our imagination and our sense of community. The local character of radio is its last unique asset. However, regulatory changes in recent decades, especially the 1996 Telecommunications Act, set the stage for dramatic consolidation of radio ownership, and a corresponding plunge in many measures of local accountability. Local musicians have diminished access to the airwaves. Local news coverage, especially substantive, balanced coverage of elections, is nearly nonexistent outside public radio.

During the Fixing Radio Forum, we asked whether radio could do a better job at serving local communities with cultural and informational programming. Inspired by the federal

government's recent interest in changing the media landscape by making changes to regulation, we asked how policy changes might improve radio's ability to embody the values of diversity, competition and localism, and to serve the public interest. As our discussion evolved from general critiques to specific proposals, we arrived at the recommendations contained in this Statement on Radio.

### **Recommendations on Content**

- The tendency towards vulgar and discriminatory shock-value programming on talk radio is encouraged and amplified by commercial factors, and the desire to attract attention at little cost. The problem is systemic, and should be addressed by systemic transformation rather than by selective fines and making examples out of individual violators. While the FCC should use greater discernment in reviewing license renewal applications, threats of nonrenewal should be linked to a station's commitment to diversity and local accountability, not the selective enforcement of industry-wide problems.
- Current FCC rules on indecency and obscenity are vague and subject to wide interpretation, opening the door to selective enforcement. Standards and enforcement methods should guarantee that stations are not targeted for fines because of unpopular political or cultural content.
- Fines for on-air violations should fall upon the station licensee, not upon individual announcers or artists whose work is broadcast.
- Fines for content violations should be scaled according to a station's revenues.
- The broadcast of public service announcements should be mandatory, and evenly distributed throughout the broadcast day. Local organizations' PSAs should be solicited and given privileged airplay.
- The Fairness Doctrine should be reinstated, along with requirements to air local public affairs programming.
- Stations should be programmed in the communities where they are licensed. Local program directors should have the right to preempt content provided by absentee owners or networks.

### **Recommendations On Artists' Concerns**

- The current broadcast rights remuneration system is unfair to recording artists, who receive no performance royalties for the broadcast of their works on commercial radio. This omission constitutes a loophole which allows radio companies to exploit artists' work without fair compensation. Just as songwriters earn royalties from broadcast, so should performers.

- Payola, or pay-for-play, is bad for listeners, local programmers, and artists not backed by large promotions budgets. Congress should enact legislation ending so-called "toll-booth" practices by explicitly banning the exchange of cash, services or other considerations for airplay or other forms of promotion by broadcasters.
- Local recording artists should have fair opportunities to access local airwaves.

### **Recommendations On Accountability**

- Radio stations have public service obligations to the markets they serve. License renewals should be local processes, with real public input and community accountability. Stations should be required to hold annual public forums in which local station managers report on PSA broadcasting and community service activity and demonstrate to the public that the station has met its public interest obligations. These forums should be advertised on the air, and should be held in a location convenient to where most listeners live and work.
- All stations are required to maintain a public file. These files should include complete records of all on-air promotions, contest rules and copy; public service announcements and time of air, reports on community service activities, Arbitron or other ratings information, and all submitted complaints.
- Accessing the public file should be as simple as possible. Stations should be required to post the entire contents of their public file on the Internet, easily accessible from their website's top page. Low-revenue stations may be exempted from this requirement.
- Broadcasting companies should not institute drawbridge policies designed to unreasonably restrict access to station directors.

### **Recommendations on Disclosure**

- On-air legal identification should include both the city or town where a station is licensed and the location of the corporate owner, e.g. "KUBE Seattle - Clear Channel Communications San Antonio."
- License renewal windows should be announced frequently on the air, and on local government websites.
- Programs involving voice tracking and syndicated news should be disclosed as such on the air.
- Promotional events sponsored by radio stations should disclose all exchanges and consideration.

- The FCC needs to have better access to data on listenership trends, station operations, and so forth. The FCC should allocate funds to gather its own data, rather than relying on private, proprietary information. All licensed broadcasters must share their own audience research data with the FCC, whether public or proprietary, whether internally developed or purchased from third party firms.
- The FCC should review changes in advertising rates resulting from industry consolidation.

### **Recommendations on Spectrum Allocation**

- While new technologies such as digital radio and narrow band-separation hold the promise of increasing access to existing airwaves, access to broadcasting will remain a limited resource. As policies are created to take advantage of technological advances, new regulations should take a broad view of the public interest, prioritizing access for new noncommercial and local broadcasters above opportunities for incumbents to increase their market power.
- The "Radio Broadcasting Preservation Act of 2000" places unreasonable and unnecessary restrictions on Low-Power FM broadcasting-it should be repealed. Local nonprofit organizations and municipalities should be encouraged to apply for new LPFM broadcasting licenses in cities and rural communities across the country.
- LPFM stations should be allowed to broadcast on third-adjacent frequencies, as recommended repeatedly by the FCC.
- LPFM stations should be allowed to broadcast using directional antenna systems, in order to target population areas.
- LPFM applicants should be allowed to challenge the licenses of translator stations, in urban areas or where FM spectrum is scarce. In consideration of such challenges, locally originated programming and local ownership should be primary measures of value.
- Previous, unsuccessful LPFM applicants should be allowed to amend and resubmit their applications without prejudice.
- Former unlicensed broadcasters should not, as a rule, be prohibited from filing LPFM applications.
- A public service fund should be established to support startup LPFM stations operated by community organizations. The fund should be supported by fees and fines paid by commercial broadcasters, or by taxes on advertising.
- Digital spectrum allocation should not privilege incumbent broadcasters.

- New entrants, local owners and noncommercial broadcasters should be privileged in new license applications, and in license transfers.

### **Recommendations on Ownership**

- No medium demonstrates more clearly than radio the essential antagonism between consolidated ownership and the democratic values of diversity, competition and localism. Regulation of radio ownership should provide a strong counterweight to the market forces which lead big media owners toward consolidation, managers toward centralization, and programmers toward hypercommercialization and uniformity. Sensible local and national radio ownership caps are needed as safeguards for diversity and competition, as well as for local accountability.
- A national market penetration limit for radio should be established. The largest owners should be brought into compliance with the new limit either by divesting stations or through Bell-style breakups.
- Stations-per-market caps should also be lowered, to prevent local monopolies or near-monopolies.
- Preference for local owners should be built into the license renewal process.
- Local media cross-ownership (radio and television stations, or broadcast stations and newspapers) should be forbidden.
- Cross-ownership of radio with booking agencies, venues, etc. is anticompetitive, and should also be disallowed.
- Noncommercial public broadcasting is an indispensable part of our radio landscape. The Federal government should increase funding to public radio through the Corporation for Public Broadcasting, and the CPB should offer increased support to new stations, including community radio and LPFM. The CPB should never require public stations to pursue "private-public partnerships" as a condition of funding.

### **Summary**

Fixing radio will not happen overnight. Some of the recommendations outlined here would require new legislation in Congress; others would call upon the FCC to change regulations or enforcement mechanisms. But it would be too cynical to think that such changes are impossible.

Radio is the most local and ephemeral of our media, with a special ability to engage and expand both our imaginations and our sense of community. If our radio today is falling short of its potential, it lies within our power to change it for the better. The contemporary radio landscape has been primarily shaped not by some natural order of things, but by an ongoing history of public policy decisions. We and our democratic institutions have a profound

responsibility to steer our media policy in a direction that better serves our democracy and our culture.

We therefore call upon the FCC and Congress to study these community-based recommendations and to use them as resources for developing new media policy which benefits the public interest; which supports local accountability and local culture; and which creates, rather than hinders, new opportunities to communicate with one another.

We also call upon communities across the United States to organize more forums like ours, where different interest groups can meet together to discuss the future of our broadcast media. This set of recommendations is one of many possible starting points for imagining the kind of radio we want. Much more remains to be discussed—about spectrum policy and new technologies; about expanding and sustaining a diverse public broadcasting sphere; about campaign finance; about the right to communicate as a human right. The airwaves belong to us—we're taking a step towards making that real.

### **Fixing Radio Forum participants**

**Frank Barrow**, Operations Manager, Kris Bennett Broadcasting (Seattle)

**Michael Bracy**, Director of Gov't Relations, Future of Music Coalition (Washington, DC)

**Ann Chaitovitz**, Director of Sound Recordings, AFTRA (Washington, DC)

**Dow Constantine**, King County Councilmember (Seattle)

**Simon Grant**, board member, American Federation of Musicians (Seattle)

**Jonathan Lawson**, Co-director, Reclaim the Media (Seattle)

**Phil Manning**, Program Director, KNDD-FM (Seattle)

**Tom Mara**, Executive Director, KEXP-FM (Seattle)

**Susan McCabe**, board member, Voice of Vashon (Vashon, WA)

**David Meinert**, Pacific NW Chapter President of the Recording Academy (Seattle)

**Sir Mix-A-Lot**, recording artist (Seattle)

**Vickie Nauman**, Online Director, KEXP-FM (Seattle)

**John Sandifer**, Executive Director, AFTRA Seattle (Seattle)

**Deborah Semer**, former Executive Director, Pacific NW Chapter of the Recording Academy (Seattle)

**Sarah Sternau**, Experience Music Project (Seattle)

**Michael Tierney**, Blue Team Management (Seattle)

**Bruce Wirth**, Public Affairs Director, KBCS-FM (Seattle)

**Billy Zero**, host of "Unsigned," XM Satellite Radio (Washington, DC)

*The Fixing Radio Forum took place in February 2004 at the Experience Music Project in Seattle, and was organized by a coalition of groups including the Future of Music Coalition, Reclaim the Media, and the Pacific Northwest Chapter of the Recording Academy, with support from Music for America, the Experience Music Project and KEXP-FM.*

## **Appendix B: FMC Payola Education Guide**

# CHANGE THAT TUNE:

**How the payola settlements will affect  
radio airplay for independent artists**

A Payola  
Education Guide  
for Musicians  
and Citizens



**By Adam Marcus**



**Future of Music Coalition**  
Education, Research and Advocacy for Musicians



**American Association  
of Independent Music**

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## Background

“Payola” – a contraction of the words “pay” and “Victrola” (LP record player) – is a term used to describe the process of labels or artists paying money to radio station DJs or employees in exchange for radio airplay.

Payola began to attract public attention in the late 1950s and 1960s when rock and roll disc jockeys became powerful gatekeepers and kingmakers who determined what music the public heard. Starting in the 1960s, federal laws were passed forbidding the direct payment or compensation of DJs or other radio staff in exchange for the playing of certain records, unless such payments were announced over the air.

The prominence of payola was temporarily held in check as a result of these laws and hearings. Eventually, however, payola-like practices did resurface, albeit in a more indirect way. Standardized business practices employed by many broadcasters and independent radio promoters resulted in a *de facto* form of payola.

Consolidation in radio station ownership following the 1996 Telecommunications Act allowed an “independent promoter” system – in which cash and goods were exchanged through a paid middleman – to strengthen. That is, until 2003, when first Senator Feingold and then New York Attorney General Eliot Spitzer began following up on rumors that payola was alive and well in the music and radio industries. Using the subpoena power of the New York Attorney General’s office, investigators collected thousands of pages of evidence from radio promoters, program directors and label executives, which implicated the four major labels and the four biggest radio station owners in a pay-for-play system. In 2004, after exacting over \$35 million in fines from the record labels and two station groups, the Attorney General sent documents to the Federal Communications Commission for additional investigation into the radio station group owners that had been implicated in the AG’s findings. After a lengthy process, the FCC announced a settlement in March 2007 with the four biggest radio owners – Clear Channel, Entercom, Citadel and CBS – that included \$12.5 million in fines and a consent decree outlining the “Rules of Engagement” for the radio industry.

The New York State investigations and FCC scrutiny from 2003 to 2007 uncovered shocking evidence of wrongdoing, and resulted in large fines and many promises about better behavior. But what have the payola investigations meant for musicians, independent labels and music fans? Has there been any noticeable impact on the conduct of labels or radio station owners?

This guide will try to answer these questions, and more. We’ll briefly look at the history of payola, the development of the “indie promoter” system, the investigations by Spitzer and the FCC and the contents of the “Rules of Engagement” signed by the four largest radio companies. Finally, we’ll put this all in the context of what it means for musicians and independent labels, and how artists are interacting with radio in the 21<sup>st</sup> century.

## Why Payola Is Such A Problem

Legally speaking, “payola is the practice of making *undisclosed* payments or other inducements to radio (or television) broadcast personnel in consideration for the inclusion of material in radio (or television) programming.”<sup>1</sup> It is perfectly legal for a record label to pay a station to play a song as long as the station’s general manager is aware of the payment and an “appropriate announcement” is made on-air. It becomes illegal when the inducements – whether money, drugs, prostitutes or anything of value – are given to the DJ, Program Director (PD), Music Director (MD), or the station itself, but are not disclosed to the public. Payola is punishable by up to \$10,000 in fines and a year in prison.<sup>2</sup>

Why would record labels and radio stations engage in payola? The underlying reason is that, as Jacob Slichter, drummer for the rock band Semisonic wrote in 2004, “There is no better guarantor of a band’s success than a hit single on the radio luring listeners into record stores to buy the album.”<sup>3</sup> In other words, commercial radio play is a crucial component of the major label promotion and sales strategy. To ensure their songs get played, record labels employ tactics – legal and otherwise – to encourage radio stations to favor their artists.<sup>4</sup> Despite radio’s declining relevancy in an increasingly online world, commercial radio airplay continues to be a major factor influencing the music purchasing habits of consumers.

Payola distorts what gets played on the radio. Instead of songs being chosen for airplay based on the merits of the performance and recording, various forms of paid consideration and business relationships determine what music gets broadcast, and how frequently. Payola serves as a barrier to access to the public airwaves; the only musicians that benefit from radio airplay are those that can afford to participate in this label/indie promoter/radio station relationship. It also misleads the public.

Looking more specifically at the negative impact of the practice: 1) Payola breaks down the relationship between radio audiences and DJs, who have traditionally been considered tastemakers that play “the best” music; 2) Songs played because of payola payments distort the charts that determine popularity; and 3) Stations are supposed to be operating in the “public interest.”

**Audience Expectations:** For decades, radio listeners have tuned into stations because they had a sense that the DJs had access to the newest and best music. To many listeners – and many record labels – DJs were the ultimate tastemakers. Their ability to create a hit through repeated airplay gave them an extraordinary level of power. It was exactly this power to persuade audiences and generate sales that encouraged record labels and radio personalities to engage in the bribery that became better known as payola.

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<sup>1</sup> Sidak, J. Gregory and Kronemyer, David E., “The ‘New Payola’ and the American Record Industry: Transaction Costs and Precautionary Ignorance in Contracts for Illicit Services.” *Harvard Journal of Law and Public Policy*, Vol. 10, No. 3, pp. 521-572, 1981 Available at SSRN: <http://ssrn.com/abstract=310606> or DOI: 10.2139/ssrn.310606

<sup>2</sup> 47 USC 508

<sup>3</sup> Slichter, Jacob. 2004. *So You Wanna Be a Rock & Roll Star*. New York: Broadway Books. p. 76.

<sup>4</sup> Coase, R. H. 1979. “Payola in Radio and Television Broadcasting.” *Journal of Law and Economics* 22: 269-328.; Dannen, Fredric. 1991. *Hit Men: Power Brokers and Fast Money Inside the Music Business*, First Vintage Books Ed. p. 162.; Caves, Richard E. 2000. *Creative Industries; Contracts between Art and Commerce*. Cambridge, MA: Harvard University Press.; Slichter 2004.

Although the power of radio to create hits has only slightly diminished, the power of the DJ has been drastically reduced. As station ownership consolidated in the 1990s, playlists became more streamlined in order to aggregate the widest possible range of listeners. Automation replaced the personal selection process, leaving DJs as little more than between-commercial announcers. Today's typical commercial radio DJ has no input into what he or she plays on the radio, but that doesn't mean that labels have abandoned attempts to influence airplay. As we cover later in this guide, more recent versions of payola take place between program directors, station managers and "indie promoters." Regardless of the specific recipient of the payola, the result is that listeners primarily hear only the songs released by the world's largest labels – those with the financial backing to participate in a pay-for-play game – instead of songs that are chosen based on artistic merit.

**Distorting the charts:** It's not just about how radio airplay drives sales; radio airplay is a major factor in establishing an artist's legitimacy and "street value." When stations and labels engage in payola, it affects which songs are played on the air, and how frequently. These distortions are reflected in radio playlist charts in *Billboard* and *Radio and Records*, which in turn affects everything from record sales to the fees that an artist can command for live appearances. Payola is anticompetitive and grossly unfair to artists who could potentially be as successful, were airplay based solely on artistic merit or audience demand.

**The public interest:** The government grants radio station licenses for free, with the understanding that stations operate "in the public interest." Stations are commercial companies and are entitled to earn a profit, but just as newspapers separate their advertising and editorial departments, radio stations are expected and required to separate their advertising and programming divisions. By engaging in payola, stations are not living up to the public interest standards that are part of their responsibilities as licensees of the public airwaves.

## History Of Payola

The earliest form of payola occurred in the vaudeville era of the 1920s and 1930s, when publishers paid performers such as Al Jolson and Fanny Brice to perform their songs. Some performers insisted on a cut of the publisher's sales to guarantee performance. Payola became a political issue in the United States in 1959 when a House of Representatives subcommittee investigating the quiz show scandals expanded the scope of its inquiry of corrupt broadcasting practices to include payola.<sup>5</sup> At the time, payola was not illegal under federal law, but a New York District Attorney was seeking misdemeanor commercial bribery charges against popular DJ Alan Freed for taking bribes from record labels. At the conclusion of the subcommittee hearings in 1960, Congress passed anti-payola laws that prohibited the undisclosed payment of cash or gifts in exchange for airplay and held radio stations responsible for any employees who accepted such enticements. In 1962, Alan Freed pled guilty to two counts of commercial bribery. Although originally charged with 26 counts and admitting to accepting \$2,500 in bribes, Freed was fined only \$300 and given a six-month suspended sentence. The 1960 statute unwittingly laid the groundwork for a new form of payola.

During the seventies, dealmakers became the principal driving force in the music business, paralleled by the rise of the promotions man. The idea took hold that *selling* the product was just as important – perhaps more important – than the product itself. The result was great sales, but the cost of selling was

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<sup>5</sup> Coase, p. 288.

greater.<sup>6</sup> The record industry had never imposed limits on the number of records that stores could return. This meant, in effect, that retailers had no inventory risk. They could accept orders of any size, knowing they could return any unsold albums or singles for full credit.<sup>7</sup> By 1979, record labels were force-feeding millions of albums to retailers and logging them as sales. But they weren't legitimate sales, and unwanted records were returned by the ton. The subsequent industry downturn led to massive consolidation among record labels.

By the end of the seventies, six major labels had begun to emerge as the oligarchs of the record business: CBS, Warner, RCA, Capitol-EMI, PolyGram and MCA. These entities were considered "major" because they handled their own nationwide distribution. Yet they soon found they required more market share to keep their distribution pipeline filled. A share of 5 or even 10 percent of the U.S. pop market was not enough; they needed 10 to 15 percent. So they began to buy small labels, and even a few large ones.<sup>8</sup> Among the majors, CBS and Warner were the superpowers, with hegemony over the business.<sup>9</sup>

Given the competitive nature of the music industry, securing radio airplay was crucial. Label executives knew that people did not buy music they had never heard, and no amount of advertising, publicity or positive reviews could generate the volume of sales that they needed to make a hit record. Even the best A&R (artist and repertoire) staff in the world couldn't save an artist if radio gave them the cold shoulder.<sup>10</sup> So radio promotion – the art and science of getting songs on the air – drove the business.

Payola had always been a means to put a price on free airplay, but it had yet to be institutionalized. The large record companies had the money, but they could not allow their own staff to make payments to radio stations. It had become too risky. While the anti-payola statute of 1960 was feeble and rarely enforced, the Racketeer Influenced and Corrupt Organizations (RICO) statute enacted in 1970 could impose heavy penalties on companies engaging in bribery. The threat of RICO liability created an incentive for labels to develop a system to insulate themselves from criminal liability or complicity.<sup>11</sup>

Payola also helped radio stations, and not just as an additional source of revenue; it imposed an external value on the music. Top 40 radio play alone could produce a hit record in most cases, yet Top 40 stations preferred to play records that were *already* hits.<sup>12</sup> Since no Top 40 station wanted to be first to debut a new song, program directors (PDs) were a tough sell.<sup>13</sup> Plus, they were assaulted with hundreds of new singles every month, but each station had only a few time slots available for new releases as most of the songs on their playlists carried over from week to week.<sup>14</sup> The continuous barrage of new product soon

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<sup>6</sup> Dannen, p. 162.

<sup>7</sup> *Id.*, p. 176.

<sup>8</sup> *Id.*, p. 111-12.

<sup>9</sup> *Id.*, p. 113.

<sup>10</sup> Dannen, p. 8-9.

<sup>11</sup> *Id.*, p. 14, citing Sidak and Kronemyer.

<sup>12</sup> *Id.*, p. 7.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

became too much for Top 40 PDs.<sup>15</sup> They wanted to be assured that a single was a priority, and the record company was going to be behind the artist. Demonstrations of support included (and in many cases still include) major backing for a concert tour, displays in record store windows and full-page ads in prominent music magazines. But even if a label's local rep made such assurances about the records he was promoting, the PD needed more proof of support.<sup>16</sup>

With this logjam between record labels and radio stations, a new and much more organized system developed called "independent promotion." This new breed of "indie promoter" had no loyalty to any particular label or station, but instead develop strategic relationships on both sides. With radio stations, the indie promoter guaranteed to pay them a fixed annual or monthly sum of money. In exchange for this payment, the radio station group agreed to give the indie promoter first notice of new songs added to its playlists each week. Record labels then hired an indie promoter who had existing (and sometimes exclusive) relationships with radio stations to hype their latest releases. It was now the indie promoter who went to the PD with only one or two singles from each label, signaling that those records were indeed priorities – if only because the label paid the indie promoter to "push" the singles for them. The indie promoter would subsequently pay radio stations a flat rate (often in the six figures annually) to be the conduit between the station and record labels.<sup>17</sup> Then, to receive payment, the indie promoter would report back to the record label the number of "spins" for each single – the number of times each station had played it – with promotion costs typically charged back to the individual artists to be recouped against their royalties.<sup>18</sup> Such arrangements were arguably payola, managed by a middleman.

By the mid-1990s, the indie promoter system was fully entrenched. "Drugs and hookers are out; detailed invoices are in," wrote Eric Boehlert in his payola series in *Salon* in 2001.<sup>19</sup> The institutionalization of the practice was in large part facilitated by the passage of the 1996 Telecommunications Act, which eliminated the national ownership caps and allowed radio station ownership to consolidate on a massive scale. "Where indies were once scattered across the country, claiming a few dozen stations within a geographic territory, today's big firms stretch coast to coast, with hundreds of exclusive stations in every major format."<sup>20</sup> Radio station groups and indie promoters used their new, national leverage to raise the stakes. "Labels would pay \$100,000 or \$200,000 to get a single added to all the Clear Channel format stations one week,' suggests one radio source. 'And if they don't pay, there is no chance in hell they're getting that song on the radio without [indie promoter] Tri State. If it's not on the list, it's not on stations.'"<sup>21</sup> The indie promoter system had turned into an inescapable part of the radio airplay quest, and labels or artists that didn't want to – or couldn't afford to – play the game found themselves with no access to radio. It was bordering on extortion.

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<sup>15</sup> *Id.*, p. 8.

<sup>16</sup> *Id.*

<sup>17</sup> Wolk, Douglas. August 16th, 2005. "The FCC sweeps Eliot Spitzer's payola findings under the rug." *The Village Voice*. <http://www.villagevoice.com/music/0534,soti,67086,22.html>

<sup>18</sup> Dannen, p. 292.

<sup>19</sup> Boehlert, Eric. March 14, 2001, "Pay for Play." *Salon*. <http://archive.salon.com/ent/feature/2001/03/14/payola/index.html>

<sup>20</sup> Boehlert. "Pay for Play".

<sup>21</sup> Boehlert. "Pay for Play".

Payola also existed in another form. Throughout the 1980s and 1990s, many radio stations organized free concerts to promote their stations and attract listeners. Usually these station shows were jammed full of powerful headlining acts, but what was disclosed in documents in 2001-2003 was the *quid pro quo* relationship behind the scenes: the artists played for free, or at a steep discount, and in exchange the station played the label's songs. It's possible the labels absorbed travel and performance expenses, recoupable to the label against the artist's album sales, but in reality the artists were giving up something of value – their typical guarantees for a live performance – in order for the artist, or another one of the label's acts, to receive airplay.

### Renewed Focus on Payola

Despite the music and radio industries' efforts to obscure the manner in which money and power were influencing what got played on commercial radio, a number of individuals and groups started to question the indie promoter system. One of those people was investigative journalist Eric Boehlert, whose 12-part series in *Salon* about payola, commercial radio consolidation and the music industry provided some of the most salacious and illustrative examples how the indie promotion system worked.<sup>22</sup>

Advocates for musicians, independent broadcasters and labels began to demand that policymakers pay attention. In May 2002, groups including the Future of Music Coalition, AFM, AFTRA, Recording Artists' Coalition, Just Plain Folks, Nashville Songwriters Association International, the Recording Academy, National Federation of Community Broadcasters and the RIAA sent a "Current Issues in Radio" letter to the FCC and Congress. In it, the groups requested that [...] "payments made to radio stations which are designed to influence playlists (other than legitimate and reasonable promotional expenses) be prohibited, unless such payments are announced over the air, even when such intent is subtle and disguised. This includes payments made through independent radio promoters."<sup>23</sup>

Some policymakers began to take notice. In January 2003, Senator Russ Feingold (D-WI) introduced the "Competition in Radio and Concert Industries Act" which – among many things – would have "closed a loophole in the FCC regulations covering 'payola' – pay-for-play – to ensure that radio station broadcasts are not improperly influenced by the payment, whether directly or indirectly, to the licensee of any radio station unless an appropriate sponsorship identification announcement is made."<sup>24</sup> In addition, FCC Commissioner Jonathan Adelstein called on the Commission to focus its attention on the issue. "There is a real need for the FCC to review its sponsorship identification rules to make sure we are addressing modern-day pay-for-play practices in the most effective way possible given our clear responsibility under the law," he said during a speech in front of the Federal Communications Bar Association in November 2003.<sup>25</sup>

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<sup>22</sup> See [http://archive.salon.com/ent/clear\\_channel/](http://archive.salon.com/ent/clear_channel/).

<sup>23</sup> See <http://www.futureofmusic.org/news/radioissuesstatement.cfm>. The statement was revised and re-sent to the FCC and Congress in 2003, with continued insistence that the FCC and Congress take action on payola. <http://www.futureofmusic.org/news/radioissuesstatement03.cfm>

<sup>24</sup> Feingold Introduces "Competition in Radio and Concert Industries Act" Senate Commerce Committee to Hold Hearings On Thursday, Feingold to Testify, January 28, 2003. <http://www.senate.gov/~feingold/releases/03/01/2003128910.html>

<sup>25</sup> Boliek, Brooks. November 23, 2003. "FCC's Adelstein Calls for Payola Probe", *Hollywood Reporter*. [http://www.hollywoodreporter.com/hr/search/article\\_display.jsp?vnu\\_content\\_id=2018119](http://www.hollywoodreporter.com/hr/search/article_display.jsp?vnu_content_id=2018119)

## The New York Attorney General's Investigation

During his tenure as New York State Attorney General (1999-2006), Eliot Spitzer established a reputation for weeding out corporate fraud. Part of his success in doing so was due to a state statute giving his office the power to subpoena witnesses and company documents pertaining to investigations of fraud or illegal activity by corporations. In 2003, after receiving tips from music and radio industry insiders, the Attorney General subpoenaed hundreds of files and emails from all four of the major record companies (EMI, Sony, Universal and Warner Bros.) and nine major radio companies (Clear Channel, Infinity (now CBS Radio), Entercom, Emmis, Citadel, Cumulus, Cox, Pamal and ABC).<sup>26</sup> The labels investigated controlled more than 80 percent of the \$12 billion in annual music sales.<sup>27</sup> The radio companies investigated controlled several thousand stations across the country.<sup>28</sup>

Feeling the heat from the ongoing investigation, some labels and radio station owners began to change their ways. Clear Channel, Cox Radio and Infinity all made a show of severing their ties with their exclusive independent promoters. A 2003 Clear Channel press release declared that the company would “begin working directly with the recording industry on specific group-wide contesting, promotions and marketing opportunities,” and quoted radio division CEO John Hogan: “Strong relationships with artists and record labels are a priority for our business.”<sup>29</sup>

However, the radio station owners' efforts to distance themselves from the indie promoter system could only protect them so much. The collected documents demonstrated that the companies had systematically – and blatantly – engaged in payola. But unlike previous payola scandals in which DJs pocketed the bribes, much of the money went directly to the bottom lines of stations' corporate owners.<sup>30</sup> For example, Spitzer's office determined that Sony BMG and its subsidiary labels had offered a series of inducements to radio stations and their employees to obtain airplay for the recordings by the company's artists. The inducements took several forms:

- Outright bribes to radio programmers, including expensive vacation packages, electronics and other valuable items;
- Contest giveaways for stations' listening audiences;
- Payments to radio stations to cover operational expenses;
- Retention of middlemen, known as independent promoters, as conduits for illegal payments to radio stations;
- Payments for “spin programs” – airplay under the guise of advertising.

E-mail correspondence obtained during the investigation showed that label executives were well aware of such payoffs and made sure that the company received sufficient airplay to justify these expenditures.<sup>31</sup>

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<sup>26</sup> Ross, Brian, Richard Esposito and Vic Walter. Feb. 8, 2006. “Pay to Play: Music Industry's Dirty Little Secret” ABC News. <http://abcnews.go.com/Primetime/Story?id=1591155&page=2> (Ross 2006(a)).

<sup>27</sup> Free Press. “Ten Things You Need to Know about Payola.” <http://www.freepress.net/payola/=faqs>

<sup>28</sup> Ross 2006(a).

<sup>29</sup> Wolk 2005.

<sup>30</sup> Ross 2006(a).

<sup>31</sup> New York State Attorney General's Office. July 25, 2005. “Sony Settles Payola Investigation.” [http://www.oag.state.ny.us/press/2005/jul/jul25a\\_05.html](http://www.oag.state.ny.us/press/2005/jul/jul25a_05.html)

In July 2005, after months of investigation, the attorney general's office settled with Sony BMG for \$10 million.

Similar evidence was collected from the other record labels. A \$5 million settlement with Warner Bros. was reached in November 2005, with Universal for \$12 million in May 2006, and EMI for \$3.75 million in June 2006. The Universal and Sony BMG settlements were roughly in proportion to the companies' share of the recording industry market where Sony, at the time, held a 23.3 percent share and Universal a 31.6 percent share. Warner Music's penalty was disproportionately low when based on its market share of 18.1 percent, because it was the first recording company to settle. Proportionate to market share, EMI's penalty appears slightly higher than either Sony BMG's or Universal's because it was the final holdout.<sup>32</sup> Although the labels did not acknowledge any wrongdoing, they sometimes admitted that individual employees had engaged in illegal business practices.<sup>33</sup>

The settlements with the four major record labels totaled \$30.1 million. An additional \$6.25 million settlement was reached with broadcasters CBS and Entercom.<sup>34</sup> In addition to the monetary settlements, the attorney general's office extracted a series of consent decrees that in effect established a new regulatory regime. The consent decrees prohibit labels from offering – and stations from accepting – anything of value beyond compensation for advertising. The exception is that labels may give each station promotional items worth less than \$25,<sup>35</sup> up to 20 copies of a CD, 20 tickets to a concert, and station staff can accept gifts worth less than \$150 for “life events and holidays” and reimbursements not to exceed \$150 for meals and entertainment. To prevent labels from skewing charts by paying for overnight spins, stations must announce any such airtime purchases to radio monitoring services beforehand (and presumably the monitoring services will exclude these plays from their charts). And, of course, under existing payola law they need to make an “appropriate announcement” on the air. Finally, stations must appoint a compliance officer to maintain logs of all items of value received in a database that the settlement requires them to create. The compliance officer must submit annual reports to the New York Attorney General's office for five years.

### FCC Response

Upon completion of its investigation, the New York Attorney General's office sent mounds of evidence to the FCC so that the agency could complete the work and determine the appropriate penalties to be exacted on the radio station group owners, which operate on spectrum licensed by the FCC. In July 2005 – on the day Spitzer announced the settlement with Sony BMG – FCC Commissioner Jonathan Adelstein called for a FCC investigation into payola.<sup>36</sup> Despite Adelstein's strong interest in completing the investigation, there was very little action at the agency at the time. Spitzer expressed frustration about the

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<sup>32</sup> Ross, Brian, Vic Walter & Richard Esposito. June 15, 2006. “Payola Probe Settlement,” ABC News. <http://blogs.abcnews.com/theblotter/payola/index.html> (Ross 2006(b)).

<sup>33</sup> *Id.*

<sup>34</sup> Dunbar, Josh. March 5, 2005. “Stations Agree on Anti-Payola Settlement.” Associated Press. [http://web.archive.org/web/20070320200821/http://biz.yahoo.com/ap/070305/payola\\_settlements.html?.v=8](http://web.archive.org/web/20070320200821/http://biz.yahoo.com/ap/070305/payola_settlements.html?.v=8)

<sup>35</sup> It isn't clear if the \$25 limit was meant to apply to each item or the total for all items. For example, if the limit applied to each item, a label could provide 100 t-shirts worth \$25 each, for a total of \$2,500.

<sup>36</sup> Federal Communications Commission. July 25, 2005. “Commissioner Adelstein Calls For FCC Investigation Based On Spitzer Payola Settlement” [http://hraunfoss.fcc.gov/edocs\\_public/attachmatch/DOC-260158A1.pdf](http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260158A1.pdf)

lack of progress at the FCC, claiming to the press that the agency was “undercutting” his investigation by negotiating with radio companies at the center of the probe. On August 8, 2005, FCC Chairman Kevin J. Martin announced that he had directed the Enforcement Bureau to review the settlement agreement reached by Sony BMG and Spitzer to examine any incidents in which the agreement discloses evidence of payola rule violations. Ultimately, however, the FCC chose to settle with broadcasters instead of continuing the investigation.<sup>37</sup>

In April 2007, Clear Channel, CBS Radio, Citadel Broadcasting Corp, and Entercom Communications Corp. each entered into consent decrees with the FCC, which terminated the FCC’s investigation. In exchange for immunity from prosecution for any previous payola violations, the companies each paid a small fine, and promised to implement new internal reforms.<sup>38</sup>

## The Voluntary Agreement

In conjunction with the FCC’s settlement, a separate voluntary radio accord was negotiated between the four radio station groups and the independent music community. Led by the American Association of Independent Music’s (A2IM) acting president, with input from artist advocates, music companies, radio programmers and promotion executives, the negotiations were designed to open a new dialog between commercial radio and the independent music community.

The core outcome of these negotiations was a set of best business practices codified in March 2007 as the “Rules of Engagement.” Underscoring the principles of access and transparency, these Rules were disseminated by the four radio groups from the top down, so all that employees of the radio stations would be aware of the agreed-upon code of behavior. Prior to these Rules, there had been no standardized code of ethics for radio station employees.

The four radio station groups also agreed to dedicate 4,200 hours of programming to independent music, and to feature “the recordings of local, regional and unsigned artists and artists affiliated with independent labels.”

The four radio groups officially acknowledged this new effort in a letter to the FCC commissioners on April 6, 2007, demonstrating their intent to turn over a new leaf in the wake of concerns about payola, and a willingness to engage with the independent music community. This letter played an important part in negotiations as it carried the tacit blessing from the FCC, which was encouraging the marketplace to actively rebalance itself through mutually agreed-upon measures.

The Rules of Engagement are reprinted below.

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<sup>37</sup> Ulaby, Neda. Jan. 22, 2007. “Rumored FCC Payola Settlement Angers Critics.” NPR. <http://www.npr.org/templates/story/story.php?storyId=6944954>

<sup>38</sup> The fines paid to the FCC were separate from the fines that CBS and Entercom paid as a result of their settlements with Spitzer.

### Rules of Engagement

1. Radio [stations] should establish, and appropriately publicize, clear and non-discriminatory procedures for music submissions and access to radio station music programmers (to the extent any such access is provided).
2. Radio [stations] should not be allowed to sell or barter access to its music programmers.
3. Radio [stations] should not form relationships with any music companies, independent promotion companies, or other parties which provide for exclusive access to radio station music programmers, nor should Radio [stations] restrict access to its music programmers to those who contribute promotional consideration.
4. Radio [stations] should not exclude independent promotion companies, as a class, from gaining access to music programmers except for independent promotion companies which are compensated based upon playlist additions or increased spins.
5. Radio [stations] shall not ask for or expect, either directly or indirectly, any quid pro quo to play music, including but not limited to: (a) Any promotional considerations including cash and prizes (b) Local concert appearances (c) Exclusive relationships with recording artists.
6. Radio (individual stations or their parent companies) shall not act in a coercive manner, make or imply threats to withhold or reduce airplay or make or imply promises to commence or increase airplay, in connection with the solicitation of any promotional consideration, or any promotional consideration promised or given to competitor stations, including concert appearances and artist "exclusives."
7. Disclosure: All cash and non-cash consideration (above a reasonable threshold) made by labels, artists, or their agents shall be confirmed in writing and shall be subject to internal tracking controls, with the information gathered as a result of these controls available to the FCC upon its request.
8. Contest prize recipients to the extent permitted by applicable law must be identified publicly, and confirmed as not employees of the radio station or members of their immediate families or households.

March 6, 2007

An important part of the Rules is that they require stations to establish and publicize clear and non-discriminatory procedures for independent artists to submit music for radio play and prohibit stations from restricting access to its PDs and music programmers to only those who provide promotional consideration or had other embedded relationships with the radio stations. The Rules also prohibit stations from establishing an exclusive relationship with a single outside promotion company. The other items reiterate the rules already embodied in the payola statute or impose some additional reporting requirements on stations.

## Concerns About the Rules of Engagement

Despite the efforts made on behalf the parties to craft a meaningful set of guidelines, the Rules of Engagement do pose a number of questions.

First, the station owners claim that the voluntary agreement is separate from the consent decrees made with the FCC. They do this so that if they violate the voluntary agreement, it is not a violation of the more formal consent decrees. And since the Rules of Engagement are strictly voluntary, any violation of restrictions set forth in the agreement that go beyond what the law requires will incur no penalty. As Senator Feingold put it in an open letter to radio companies, “The weakness of the voluntary reforms is that there is no impartial arbiter like the FCC to determine the meaning of the rules, so they can be parsed or ignored with only public opinion as a partial check.”<sup>39</sup> A much better solution would have been for the FCC to create a designated payola investigator in the Enforcement Bureau whose regular scrutiny would permanently suppress payola.

The Rules of Engagement also contain no system to oversee the stations’ compliance with the agreement. The closest it comes is a note that the FCC can request information tracked by stations on consideration paid/made by artists and labels. And stations only need to track consideration that is “above a reasonable threshold.” There is no guidance given about where that threshold is set. If stations have not been following payola laws in the past, a voluntary agreement to provide information to the FCC, if and when requested, is not much oversight. To succeed, these new operating procedures call for constant vigilance on the part of all cooperating parties.

Even if stations do collect useful information and it is given to the FCC, the agreement does not state whether the FCC can (or must) release this information to the public. The FCC has a very bad track record at overseeing stations for payola violations – it likely would have done nothing if not for Eliot Spitzer and a few members of Congress pushing it to act. The last payola violation the FCC pursued before Spitzer was in 1984. Without public oversight, stations are given free reign to obfuscate while continuing to engage in illegal practices.

### The “Indie Set-Aside”

The four station groups also signed a separate voluntary document that is commonly referred to as the “indie set-aside.” In it, CBS, Citadel, Clear Channel and Entercom agree, on a purely voluntary basis, to collectively air 4,200 hours of programming between 6 AM and midnight, which will feature “the recordings of local, regional and unsigned artists affiliated with independent labels.”

While the intentions behind the indie set-aside are clear – to encourage radio station group owners to play more independent content – the vague language in the agreement makes it very easy for radio stations to claim that their current programming methods are in compliance. Of course, there would be no need for this agreement if independent music was already in rotation. Further clarification among the negotiating parties may be needed to ensure the station groups live up to the accord rather than reinterpret it for the purpose of avoidance.

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<sup>39</sup> Senator Russell D. Feingold. July 11, 2007. Letter to radio companies. <http://feingold.senate.gov/~feingold/releases/07/07/20070711.html>

Specifically, the reference to local and regional artists may cause confusion, as a local or regional performer may indeed be signed to a major label. There is also no definition for the term “regional” included in the document. What factors determine where an artist is based? Is it the city in which the band was first formed, or where the members currently reside? Do the Red Hot Chili Peppers qualify as a local band for Los Angeles stations? If the set-aside was written to apply only to independent and independent label-affiliated artists, it would be far more significant.

Second, the companies can choose which of their stations will provide the indie music set-aside. The set-aside states: “These programs will air on appropriately-formatted stations selected by the Radio Companies ...” This was intended to exclude stations with no music programming (e.g. talk radio) and those stations that do not play new music (e.g. Classic Rock), but companies could try to claim that only stations in smaller markets are “appropriately formatted.”

Third, there’s no timeline associated with the promises of airing 4,200 hours of programming. Is that 4,200 hours a week? A year? Even if each station plays just one song by an unsigned artist each week, can they claim they’re in compliance with the Agreement because they’re making steady progress towards the goal of 4,200 hours? While this clause was meant to respect individual marketplace conditions and allow a reasonable rotation scheme that reflected a station’s position in its community, the radio stations could, either intentionally or not, misconstrue it. This lack of clarity makes measurement of compliance difficult.

Even if the station groups comply with the agreement, the actual number of hours in the indie set-aside is actually quite low. As of January 2008, Clear Channel owned 1,005 radio stations. If it applies the indie set-aside to all of those stations, each station would have to play just over an hour and a half of music by independent artists to comply with its 1,600 hour share of the set-aside. If it applies the set-aside to only the 275 Clear Channel stations in the top fifty markets, each would have to play less than six hours of music by independent artists to meet its share. Spread out across a year (as an example), six hours works out to just two songs per week. The other station groups would have to play even less to fulfill their share of the set-aside. Any of these figures is in contrast to the actual market share of independent music, which accounts for 80 percent of all releases worldwide and represents 30 percent of all music sold.

Heavy rotation is the key to market penetration, and 4,200 hours spread across all stations represents a small amount of time. A better approach might be to work with a smaller number of stations that are willing to engage with the independent community and expand programming. It’s important not to lose sight of the fact that independent music belongs on commercial radio and is just as vital as the music currently receiving heavy airplay. Changing the prevailing culture at commercial radio will take a concentrated effort with all parties working on a good faith basis.

## What Can Artists Do?

### Do Research, Establish Relationships

A2IM suggests that artists be strategic when approaching stations. An essential part of working with radio – commercial and noncommercial – is doing the necessary research to develop a list of stations that would be most likely to play your music.

Start with local stations that play the format of music that you play. Look on websites to figure out the program directors' names and the station mailing addresses. See if any of the stations have any specialty shows and address the package to the right person. Then, use the web and internet radio to find more stations like that in other cities.

When you have CDs ready to send out for promotion, determine how many you'd like to send to radio and prioritize your list. Artists need to have a simple package with a promo CD and a "one sheet" with very little verbiage, other than a description of musical genre and one "hook". The promo CD should have the best song first, second best second, etc. The MD/PD/intern who listens to the CD will listen for only a minute or two at most, so lead with your best song. Worry about the track order when you release the CD for sales.

Once you've sent out the packages, start establishing relationships by putting in a call to the station's program director. Let them know the release date, or about upcoming shows. Note that PDs often have specific times slotted to take music calls. Determining the most appropriate time to call may affect your chances of getting through. If you don't actually talk to the person, just leave a brief voicemail.

Radio professionals are busy people; be sure to follow-up on your promotional efforts. And if you do get some airplay, be sure to place calls to track spins and encourage further airplay.

Note that this kind of relationship-building doesn't happen overnight. If getting radio airplay is something you want to achieve, do your research, build your lists, and make your phone calls for every release. If you don't service your music and consistently update PDs/MDs about your artists, they won't be familiar with you when you do have a "hit", which will make it that much more difficult for you to get the airplay you deserve.

### How the Set-Aside Could Help You Get on Commercial Radio

Start with stations in your local area. You can then describe your band as both independent \*and\* local.

Find out if any of the stations in your area are owned by one of the four companies which signed the voluntary agreement. First go to Radio-Locator, <http://www.radio-locator.com>, and find the stations you're interested in contacting based on their format. Write down the call sign for each station and then check the websites below to find out the station's parent company.

Clear Channel	<a href="http://www.clearchannel.com/Radio/StationSearch.aspx">http://www.clearchannel.com/Radio/StationSearch.aspx</a>
CBS Radio	<a href="http://www.cbsradio.com/stations/index.html">http://www.cbsradio.com/stations/index.html</a>
Citadel	<a href="http://www.citadelbroadcasting.com/citadel_broadcasting.aspx?id=2635">http://www.citadelbroadcasting.com/citadel_broadcasting.aspx?id=2635</a>
Entercom	<a href="http://www.entercom.com/markets.php">http://www.entercom.com/markets.php</a>

If a company that signed the voluntary agreement owns the station, the Rules of Engagement state that each station should establish and publicize the procedures for submitting music and contacting the station's programmers. If you can't find these procedures on the station's website, check the parent company's website. If you don't find anything, call the station and ask. If they don't know what you're talking about, confirm they're still owned by a company that signed the voluntary agreement and then politely explain the Rules of Engagement – offer to email them a link to the Rules.

[www.futureofmusic.org/images/FCCrulesofengagement.pdf](http://www.futureofmusic.org/images/FCCrulesofengagement.pdf)

If a station is not owned by company that signed the voluntary agreement, it is under no obligation to play your music, but you can use the same tactics. Furthermore, you should point out that other stations will be playing a lot more local and independent bands, and they should too.

### **What To Look Out For**

The recent settlement agreements do not mean that artists should drop their guard. Clear Channel responded to the settlement agreements with a pay-for-play scheme aimed at indie artists. In May 2007, Clear Channel set up an online application for local and independent artists to submit their music for airplay on each of its stations. But A2IM and FMC found some troubling language in the license agreement: Artists had to agree to grant “Clear Channel the royalty-free non-exclusive right and license, in perpetuity [...] to use, copy, modify, adapt, translate, publicly perform, digitally perform [...]” the content submitted via their website. In other words, Clear Channel was asking artists to waive their performance royalties as a consideration for airplay.

On July 12, 2007, Senator Russ Feingold (D-WI) sent a letter to each of the major radio station groups, questioning their intent to honor the conditions of the payola consent decree. Feingold referenced the Clear Channel royalty issue in the letter, saying that the “required royalty waiver seems to violate the April commitment not to barter access to music programmers. I encourage you all, and Clear Channel in particular, to clarify this issue.” On July 13, FMC filed a Request for a Declaratory Ruling at the FCC over Clear Channel's actions. By the end of the week, Clear Channel had had enough. By July 16, 2007 Clear Channel had revised the language in the licensing agreement. The new language removed the words “royalty-free” from the agreement, which ensures that artists retain their rights to their public performance royalties.

When reviewing any future submission agreements, be wary of anything that seems like a backhanded way to get around the payola laws and the new Rules of Engagement. Also be on the lookout for both terrestrial as well as non-terrestrial royalty waivers, which apply to online streaming simulcasts. If you have a question about terms you must agree to as a condition for having your promo considered for airplay, contact the Future of Music Coalition at [payola@futureofmusic.org](mailto:payola@futureofmusic.org) or Jim Mahoney at A2IM at [jim.mahoney@a2im.org](mailto:jim.mahoney@a2im.org)

### **Is It Possible To Hire An Indie Promoter?**

This depends on the practices of each radio ownership group. CBS has a list of registered independent promoters who have signed on to the FCC ruling and Rules of Engagement who are supposed to get access. A2IM does not believe anyone on this list has been denied access to radio stations, so if someone is on that list, he or she may be worth hiring. On the other hand, as of January 2008, Clear Channel's West Coast region was not taking any calls from independent promoters, and since most indie artists and labels do not have regional promotion staff, this puts them at a great disadvantage.

It's probably better to learn the marketplace and focus on public radio and regional shows to start. Major radio station ownership groups don't like to play artists that are not already established, especially indie artists and indie labels. We suggest avoiding this expense until a buzz develops.

### **What To Do If You Suspect or Have Evidence That a Station Is Engaging In Payola**

Technically, payola violations should be reported to the FCC. The Commission's website at [www.fcc.gov](http://www.fcc.gov) includes instructions about how to file a complaint using their online forms. They ask you to include:

- Your name, address, email address, and phone number where you can be reached;
- Name and phone number of the company that you are complaining about and location (city and state) if the company is a cable or satellite operator;
- Station call sign (e.g. KDIU-FM or WZUE TV), radio station frequency (1020 AM or 88.5 FM) or TV channel (13), and station location (city and state);
- Network, program name, date, and time of program if you are complaining about a particular program; and
- Any additional details of your complaint, including time, date, and nature of the conduct or activity you are complaining about and identifying information for any companies, organizations, or individuals involved.

### **Working With Noncommercial and Low-Power Stations**

Although the voluntary agreement only applies to the four station ownership groups listed above, noncommercial and low-power stations are generally more approachable and willing to take chances with independent artists. But some noncommercial stations can be *worse* than the major station groups, using the guise of being a friend to independent artists. Don't always believe a noncommercial station representative when they claim they can't afford to pay royalties, and be cautious before signing anything.

### **Share Information**

FMC and A2IM are in the process of working with large station groups to monitor what is happening in the marketplace and ensure changes in access for independents. This means we are looking for independent artists and labels to share their experiences, both good and bad, as they relate to radio access. The goal is to use these stories to build a set of best practices which can be circulated across all radio station groups. If you'd like to tell us about your experiences, write to [payola@futureofmusic.org](mailto:payola@futureofmusic.org) and [jim.mahoney@a2im.org](mailto:jim.mahoney@a2im.org).

## Links and Resources

Reviewing the websites below is a great next step. You can also check out the documents referred to in the footnotes above.

- **The FCC's Payola Rules** <http://www.fcc.gov/cgb/consumerfacts/PayolaRules.html>
- **Future of Music Coalition's** website, which contains lots of information about payola and other issues of importance for independent artists. The best way to stay up-to-date on these issues is to subscribe to the monthly FMC newsletter. <http://www.futureofmusic.org>
- If you want even more frequent FMC updates, check out the **FMC blog**. <http://futureofmusiccoalition.blogspot.com/>
- **The American Association of Independent Music (A2IM)** represents a broad coalition of music labels to promote sector opportunity and enhance the market share of its combined membership. <http://www.a2im.org>